Brodie [5] and *Sweet and Maxwell Ltd.* v. *Universal News Services Ltd.*,[6] which do not carry the matter any further.

In the present case, as was stated by the learned trial judge, the appellants were in breach of their obligation to make fortnightly payments. Their deliberate refusal to pay what was already due by way of fortnightly payments was an important element on the question of their repudiation of the contract. Furthermore, they ordered the respondents to stop work. This stoppage of work by them clearly went to the root of the contract. In the circumstances, the respondents had no option but to treat the contract as at an end and to sue for payment for the work which they had already done. In our judgment they were entitled to recover the amount claimed either on the basis of work done by them at the appellants' request or by way of damages on the basis of *quantum meruit*.

We could also find no reason to quarrel with the finding of the learned trial judge on the appellants' counterclaim when he said:—

"There is in all probability a sum due to the defendants in respect of fuel-oil, lubricants, messing and other necessary charges incurred by the plaintiffs in respect of the second phase. The defendants have failed to prove this amount though they have claimed for it in their counterclaim. They must be left to make their claim, if they are so advised, in another action. As for damages, they have failed to prove any, but in view of my finding that it was the defendants who were in breach, their failure is hardly material."

For the reasons I have stated, we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Dharmananda & Co.*; *S.N. Leow.*

PUBLIC PROSECUTOR v. SIVASUPRAMANIAM

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian and Ali F.JJ.) June 20, 1969]

[K.L.—Federal Court Criminal Reference No. X.1 of 1969]

Local authority — Commencing building operations without prior authority — Whether landowner only person liable — Municipal Ordinance (S.S. Cap. 133), s. 144(7), (10)(a), (11) and (12).

The question reserved for the decision of the Federal Court in this reference was: "Whether the owner of land, upon which there is erected an unauthorised building, is the only person who can be charged with an offence under the provisions of section 144(7) of the Municipal Ordinance (Cap. 133)".

This reference arose out of the decision of the High Court allowing the appeal from the decision of the learned magistrate convicting the respondent of an offence punishable under section 144(10)(a) of the Municipal Ordinance ([1968] 1 M.L.J. 80).

Held, answering the question in the negative: Section 144(12) of the Municipal Ordinance was merely intended to impose liability on an ascertainable person where the actual culprit is unknown or cannot be traced. There is nothing in this subsection which exonerates the actual offender when this is known and no insuperable obstacles prevent the prosecution from proving his guilt; it is not available as a defence to any third party, not the landowner, who in fact is guilty of carrying out unauthorised building operations.

Lim Beng Teck v. *R.*[1] dissented from. Decision of the court below ([1968] 1 M.L.J. 80) reversed.

Cases referred to:—

(1) *Lim Beng Teck* v. *R.* [1957] M.L.J. 21.

(2) *Darus bin Ahmad* v. *Public Prosecutor* [1965] 1 M.L.J. 200.

(3) *Public Prosecutor* v. *Phang Swee Lan* [1960] M.L.J 6.

(4) *Public Prosecutor* v. *Phang Swee Lan* [1960] M.L.J. 147, C.A.

(5) *Syed Ahmad Aljuned* v *R.* (1962), 3 M.C. 312.

(6) *Attorney-General* v. *Beauchamp* [1920] 1 K.B. 650.

The following cases were also cited in argument: *Canada Sugar Refining* v. *R.* [1898] A.C. 735; *Eastbourne Corporation* v. *Fortes Icecream Parlour (1955), Ltd.* [1959] 2 Q.B. 92; *Associated Newspapers* v. *Registrar Restrictive Trading Agreement* [1964] 1 All E.R. 55; *The Queen* v. *Allen* (1872), L.R. 1 C.C.R 367; *Hill* v. *East and West India Dock Co.* (1883-84), 9 App. Cas. 448; *Ex parte Walton* (1881), 17 Ch. D. 746; *Inland Revenue Commissioner* v. *Hinchey* [1960] A.C. 748.

FEDERAL COURT.

Robert K.C. Hoh (*Abdul Hamid bin Tan Sri Azmi* with him) for the appellant.

Ranjit Singh for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): The question of law reserved for the decision of this court, on the application of the Public Prosecutor, under section 66 of the Courts of Judicature Act 1964 is:—

"Whether the owner of land, upon which there is erected an unauthorised building, is the only person who can be charged with an offence under the provisions of section 144(7) of the Municipal Ordinance (Cap. 133)"

It arises out of the decision of Gill J. (as he then was) allowing an appeal from the decision of the magistrate at Kuala Lumpur, convicting the respondent of an offence punishable under sub-section (10)(a) of section 144 of the said Ordinance.

The facts of this case were never in dispute. At all material times Madam Yoong Lee was the owner of the land comprised in Lot 3806 in the Mukim of Setapak. In November 1964 she saw Sivasupramaniam, the respondent, erecting a timber frame building measuring 10′ x 16′ on her land and reported the matter to the Municipality. It was the extension to

an existing temple, but for which no plan had been submitted to the Municipality for approval, contrary to section 144(7) of the Ordinance. For this offence the respondent was convicted in the magistrate's court and fined the sum of $30 and further ordered to demolish the unauthorised building pursuant to the provisions of sub-section (10) of section 144.

He appealed on two grounds. On the facts he failed as concurrent findings of both the magistrate and Gill J. were against him. He succeeded, however, on the question of law, which involved the construction of sub-section (12) of section 144 which reads:—

"Where any building operations are commenced or carried out in respect of any building, they shall be deemed to have been commenced or carried out by the owner of the land whereon such building is erected and he shall be liable therefor."

This point raises once again the much-debated question whether or not sub-section (12) has the effect of limiting liability solely to the owner of the land, regardless of his being completely innocent of any contravention by himself (or by anyone for whom he is vicariously liable) of sub-section (7) which provides that "no person shall commence any building operations involving the erection of a building" unless he has given to the Commissioners four days notice of such intention and a plan and specification of the building have been approved by them. In other words, the question is whether any person, who has in fact been guilty of infringement of sub-section (7), is entitled to thumb his nose at the prosecution by foisting his liability on the owner of the land by virtue of sub-section (12).

In support of the respondent's contention two cases were cited: *Lim Beng Teck* v. *R.*[1] a decision of Whyatt C.J. (Singapore) and *Darus bin Ahmad* v. *Public Prosecutor*[2] decided by Suffian J. (as he then was). A decision to the contrary, by Adams J. *Public Prosecutor* v. *Phang Swee Lan*[3] was reversed however, by the then Court of Appeal[4] on an issue of fact, leaving unanswered the question of law referred under section 34 of the Courts Ordinance 1948, which is now substituted by section 66 of the Courts of Judicature Act. In deference perhaps to the weight of authority, especially the judgment of the Chief Justice of Singapore, Gill J. held that "the reading of section 144 as a whole makes it clear that the legislature intended to saddle the owner of the land with the sole responsibility of seeing that section 144 was complied with", notwithstanding that it is extremely unfair to do so and thereby condoning a prevalent widespread flouting of the prohibition against illegal building. In the judge's opinion the only remedy lies with the legislature.

In *Darus bin Ahmad*, the appellant, chairman of a company, pleaded guilty to erecting an unauthorised building and was convicted and fined. The land was held, not by him, but by the company on a temporary occupation licence. He appealed on the ground that the proceedings were null and void. It was held that the person liable for the erection of the unauthorised building under the Town Boards Enactment was the owner of the building whereon that building was erected and as there was no admission or evidence that the appellant was the owner of the land, the conviction must be quashed. Our view is that this case must be read in the light of its own facts, as the Court of Appeal did in *Phang Swee Lan*. In both cases there was no evidence, either that the person charged was in any manner responsible for the illegal building or that he was the owner of the land. The question of sub-section (12) (or the corresponding provisions in the Town Boards Enactment) being a complete defence to the charge was, therefore, never authoritatively answered.

In *Syed Ahmad Aljunied* v. *R.*,[5] decided in 1962, Rose C.J. (Singapore) referred to *Lim Beng Teck* as "authority for the proposition that proceedings under section 144 of the Municipal Ordinance should properly be brought against the owner of the land and not the owner of the building". The appellant before Rose C.J., it may be observed, was a person within the definition of "owner" under section 3. As laying down any principle regarding the landowner's sole and exclusive liability for illegal building thereon what fell from the Chief Justice must be regarded as *obiter*.

We turn now to the judgment of Whyatt C.J. (Singapore) in *Lim Beng Teck*. There the appellant was owner of the illegal building, but not of the land, so it is a direct authority on the point now referred to this court. It is, of course, not binding on us, being the judgment of a single judge of the Supreme Court of the then Colony of Singapore, but judicial courtesy requires that we do not lightly dissent from the considered opinion of our brethren in another jurisdiction which follows the common law. The reason given by Whyatt C.J., which persuaded Gill J. towards the same view of sub-section (12) was as follows:—

"It is true that the provisions of sub-section (7) could be construed to cover any person who commenced building operations, irrespective of whether such person was owner of the land or the building and if this sub-section stood alone, every prosecution would involve factual inquiry as to who was the person who had commenced the building operations which were the subject of the complaint. Such an inquiry might present considerable practical difficulties, particularly if the buildings were of a temporary character, and it was doubtless, with the object of avoiding or minimising such difficulties that the legislature introduced the legal

fiction in sub-section (12) that building operations were to be deemed to have been commenced by the owner of the land on which the building stands.

It would be surprising if the legislature, having taken the unusual course of establishing a legal fiction for the purpose of facilitating a prosecution, should have intended that a prosecution could also be brought on a factual basis. If that had been the intention of the legislature, I think sub-section (12) would have contained some qualifying words, limiting the operation of the legal fiction to those cases where no prosecution was or could be brought on a factual basis. But there are no such qualifying words and if the construction contended for by the respondent is correct, it would follow that two prosecutions could be brought under section 144 and two punishments could be imposed on two different persons, notwithstanding that only one offence had been committed by one person. It is possible, of course, for the legislature to legislate for such an anomalous result if it so wishes, but I should require clearer words than appear in this section before I could be persuaded that this was its intention. In my judgment, the purpose of sub-section (12) of section 144 is to provide, by means of a legal fiction, a simple and speedy method of preventing unauthorised building and it was intended that this method should be in substitution for the normal method of establishing liability for a breach of a statutory provision of this character."

With respect, we are unable to share the view of the learned Chief Justice. He agreed that sub-section (7) was "wide enough to include the appellant"; but thought a prosecution of the actual offender "would involve a factual inquiry . . . . which . . . . might present considerable practical difficulties". (This, we must say, is true of practically every prosecution). To overcome these difficulties the legislature by sub-section (12) had introduced a legal fiction. This, in his view, was incompatible with a prosecution on a factual basis, the reason being that in the result, "two prosecutions could be brought under section 144 and two punishments could be imposed on two different persons, notwithstanding that only one offence had been committed by one person".

The short answer, in our opinion, is that sub-section (12) was merely intended to impose liability on an ascertainable person where the actual culprit is unknown or cannot be traced. In that event, of course, the owner of the land on which the illegal building stands will be the the only person against whom a mandatory demolition order can possibly be made, observance of section 144 being expedient in the public interest. On the other hand, there is nothing in this sub-section which, by necessary implication, exonerates the actual offender when he is known and no insuperable obstacles prevent the prosecution from proving his guilt. While fastening liability on the landowner, it will be noted that the sub-section is completely silent as to third parties who contravene sub-section (7) or (10). They refer in general terms to the offender *viz.*, "no person shall commence etc." and "any person who etc." Therefore, unless liability is clearly defined in section 144 as being necessarily in the alternative, we do not feel compelled to hold that it must be so. Sub-section (12) does not declare that the owner shall be "solely liable". Hence we cannot see why creation of an absolute offence on the part of the landowner should be held incompatible with the occupier, in a proper case, or any other person, being charged and convicted for his own wrongdoing. As pointed out by Gill J., "there are offences known to the law for which two separate persons can be charged, as, for example, in the case of some offences under the Road Traffic Ordinance, 1958". See also *Attorney-General* v. *Beauchamp*,[6] on the liability of printers and publishers.

As we have observed earlier, sub-sections (7), (10) *et al.* are applicable generally to all persons carrying out building operations. Sub-section (11) next provides that for the purposes of section 144 "a person *shall be deemed to erect a building*" who does certain forms of construction work, specifically described, or who "infringes the provisions of this Ordinance as to buildings or of the building bylaws". It seems to us highly pertinent that these "deeming" provisions should be considered in relation to the other provisions laid down by sub-section (12). Unless the object and intent of sub-section (11) is to impose liability on persons other than the landowner for unauthorised building operations, this sub-section is an excrescence which means nothing. If, on the other hand, it is to be construed, as it ought to be, so as to give effect thereto, as well as to sub-section (12), then it must fortify our view that sub-section (12) is not available as a defence to any third party, not the landowner, who in fact is guilty of carrying out unauthorised building operations.

Does the public interest require that, even where a guilty person is known, he should nevertheless be permitted, by virtue of a legal fiction introduced for a clearly specific purpose, to go scotfree by making another person who is completely innocent pay for his wrongdoing? Is this or any court bound to put such a narrow legalistic interpretation on sub-section (12) that manifest injustice must always result? We say "always" because, in the instant case, if we answer the question in the affirmative, the conviction of the landowner becomes inevitable as well as the acquittal of the wrongdoer. Is this a reasonable interpretation of the will of the Legislature? It is a universal principle that when a penal provision is

reasonably capable of two constructions the interpretation which does justice is to be preferred to another which is palpably absurd and unjust. Applying sub-section (12) so as to bring about conviction of the innocent and acquittal of the guilty not only defeats the very purpose of the Ordinance, but undermines public confidence in the law and the administration of justice.

Our answer to the question under reference is accordingly in the negative.

Question answered in the negative.

Solicitors: *Shook Lin & Bok; Ranjit, Thomas & Kula.*

PUBLIC PROSECUTOR v. YUVARAJ

[P.C. (Lord Hodson, Lord Guest, Lord Pearce, Lord Pearson and Lord Diplock) July 1, 1969]

[Privy Council Appeal No. 28 of 1968]

Bribery and Corruption — Presumption of corruption against accused — Degree of proof required to rebut presumption — Whether presumption rebutted by a defence which is reasonable and probable or whether it can be rebutted only by proof that defence is on such fact the existence of which is so probable that a prudent man would act on supposition that it exists — No relevant difference between two tests — Test to be applied is balance of probabilities — Prevention of Corruption Act, 1961, ss. 4(a) and 14.

Evidence — Burden of proof — Difference between criminal proceedings and civil proceedings — Burden on accused to rebut a presumption — Test to be applied is that applicable in civil proceedings — Balance of probabilities — Evidence Ordinance, 1950, s. 3.

In this case the respondent had been in the employment of a public body and it was found that a gratification had been paid or given to him. His defence was that it was not paid or given and accepted corruptly. He was acquitted by the President, Sessions Court, Mr. W. Satchithanandhan, who found the agent provocateur who delivered the money to be a witness wholly unworthy of credit, that in respect of the respondent's alleged corrupt motive there was no corroboration of the evidence of the prosecution witness and that the respondent's explanation was not only "probable and credible in all the circumstances of the case" but also "consistent and compatible with the superior probability of his innocence." The acquittal was upheld on appeal to the High Court by Ali J. The following question of law was however reserved for the decision of the Federal Court under section 66 of the Courts of Judicature Act, 1964:

> "Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (Section 3 Evidence Ordinance)."

The Federal Court preferred the description in the first part of the question and held that the burden of discharging the presumption may be discharged by a defence which is reasonable and probable ([1968] 1 M.L.J. 238). On appeal to the Privy Council,

Held, dismissing the appeal: upon the true construction of the Evidence Ordinance, 1950, and the Prevention of Corruption Act, 1961, there is no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question if "the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable" is understood as meaning "the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961."

Semble: The Evidence Ordinance applies to civil and to criminal proceedings alike and the definitions of "proved" and "disproved" draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the Evidence Ordinance intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities.

Where an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved", the test is the same as that applied in civil proceedings: the balance of probabilities.

Cases referred to:—

(1) *Dhanvantrai* v. *State of Maharashtra* A.I.R. 1964 S.C. 575.

(2) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462.

(3) *Newis* v. *Lark* (1571), Plow. 412.

(4) *Cooper* v. *Slade* (1858), 6 H.L.C. 746, 772; 10 E.R. 1488.

(5) *R.* v. *Carr Briant* [1943] K.B. 607.

PRIVY COUNCIL appeal heard on May 13, 1969.

Rt. Hon. Sir Dingle Foot, Q.C. and *M.P. Solomon* for the appellant.

L. Blom-Cooper, amicus curiae.

Respondent *ex parte.*

Lord Diplock (delivering the judgment of the Board): The respondent was charged before the Sessions Court, Batu Pahat, with an offence under section 4(a) of the Prevention of Corruption Act 1961, which is in the following terms:—

"If —

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person,